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NO. 80-106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAICI,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

SAMUEL GOTTLIEB
Attorney for Petitioner
122 EAST 42ND STREET
NEW YORK, NEW YORK 10017
(212) 697-3440

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IN THE
SUPREME COURT OF THE UNITED STATES

SAICI,

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PETITIONER'S REPLY MEMORANDUM

The Government's memorandum begins with the demonstrably fundamental erroneous statement that "the Bosurgis brought an action in a state court against the [Chemical] bank for mismanagement of their account" that "was settled with the bank's promise to pay $215,000 to them" (pp. 1-2) which if correct, we acknowledge, would undermine our constitutional

challenge to the Government's seizure of those funds amounting to $400,000 awarded to SAICI by the New York State Court judgment. The record and indeed the admissions of the Government are directly to the contrary.

Leone and Emilio Bosurgi brought a common law action in the New York State Supreme Court against the bank for fraud, conversion and misconduct involving the bank's wrongful security transactions. The Government's brief (p. 3) on the initial appeal which reversed the granting of SAICI's motion for summary judgment (U.S. v. Bosurgi, 530 F.2d 1105 [2d Cir. 1976]) concedes that there were no funds in existence at the time the suit was instituted and that it was "based upon

alleged mismanagement of the account by Chemical Bank, which reduced its value to zero."

The complaint in the Bosurgi lawsuit contained no reference to Adriana Bosurgi or her estate. The attorney for the Bosurgis, Mr. Ginsberg, testified when examined by the Government in pretrial deposition that at the time that he brought suit he did not even know of Adriana's existence. Furthermore, the undisputed court records and proceedings heretofore had below indicate that:

> "No funds, assets, securities, claims or causes of action belonging to Adriana Bosurgi or to her estate, were involved, nor did such settlement affect or impair, or impede the rights of anyone, including the Government, or the bank itself, against her estate." (A50-1)*

* * *

* A refers to appellant SAICI's Appendix.

> "The bank received no release of any kind from or on behalf of the estate. In the state court litigation, the bank did not claim***that the claims of wrongdoing and fraud which were alleged and settled, if perpetrated by the bank, were perpetrated only against the estate." (A51)

Thus, the only party who could conceivably claim any damage perforce of the state court judgment if SAICI's claim was untenable would be the bank.

Understandably, SAICI was and is entitled to rely on the integrity of its state court judgment which was unconstitutionally disregarded below.

Moreover, the Government acknowledges in its prior brief to the court below (p. 3) that this action was "tentatively settled" by the bank and was not consummated because of a dispute between Mr. Ginsberg and bank

counsel which had not been resolved when SAICI appeared on the scene. SAICI's intervention in the lawsuit, as our petition points out, was successfully resisted by all, the Bosurgis, the bank, Mr. Ginsberg and the Government, as we have said, from the sidelines. SAICI then brought an independent lawsuit and was successful in the contested proceeding that thereafter developed, on the basis of documentary proof the veracity of which Mr. Ginsberg was constrained to acknowledge and which the bank could not and did not refute. Indeed, at the New York State Appellate Division the bank in its brief stated that it "takes no position on the merits of plaintiff's [SAICI's] summary judgment motion"; since the bank's funds were involved

it had every right to challenge the authenticity of the documents relied on and indeed was in the best position to do so because of the close and covert relationship that existed between the bank and the Bosurgis since 1954.* As to the position so taken by the bank's

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* From the very inception of the banking relationship, as Mr. Ginglen, the bank official in charge of the matter testified in the State Court action and reaffirmed it in the deposition taken by the Government:

"Q You got your instructions from him [Leone Bosurgi] then from 1949, is that correct?

A He was the only one I had contact with.

* * *

Q He was the only one, isn't that correct?

A He was the only one that issued instructions on the account.

Q You never spoke to Adriana Bosurgi along those lines at any time, did you?

A I had no contact with her except when the custodian account opened.

Q Only in connection with the opening of the custodian account?

A Correct." (A 58)

Although Adriana was designated "owner" of the custodian account, her sons, the Bosurgis had an unlimited power of attorney with respect thereto; she evidently was merely their nominee. (A 61)

counsel, as this Court in Oscanyan v. W.R. Arms Co., 103 U.S. 261, 263, stated:

> "Any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof."

The foregoing applies as well to the acknowledgment by Ginsberg, Bosurgis' attorney, as to the authenticity of the documentary matter submitted in the State Court, upon the basis of which summary judgment was granted and the ultimate judgment entered, from which no appeal was taken.

The impact of SAICI's State Court judgment and the liability imposed was solely against the bank and the bank's funds furnished in settlement and satisfaction thereof. Neither the Government nor the estate of

Adriana Bosurgi had the right to oppose such disposition since their rights, if any, against the bank were not impeded, impaired or legally affected thereby.

Even if it were to be assumed that the bank wrongfully and deliberately defaulted and willfully failed to challenge the validity of SAICI's claims, which the bank was not and is not accused of doing, SAICI's State Court judgment against the bank and as to the bank's funds is invulnerable (Yonkers Fur Dressing Co. v. Royal Insurance Co., 247 N.Y. 435, 444). Hence there is no ground, as the Government's opposing memorandum here asserts (p. 5) for not adhering to the State Court decision, on the basis that the Court of Appeals in reversing summary judgment for SAICI held that "even if

due regard is accorded to the State Court's adjudication* * *it would be only as valid as its evidentiary base."* The limitation of the judgment to "an evidentiary base" we submit cannot constitutionally be sustained.

The Court of Appeals in its prior opinion reversing SAICI's summary judgment did not rule, as the Government contends (p. 3), that SAICI's "judgment was not binding on the federal court which had assumed custody of the fund" but stated "it must resolve all ambiguities and draw all reasonable inferences in favor of the party [the Government] against whom summary judgment is sought ...with the burden on the moving party [at trial] to demonstrate the absence of any material factual issue genuinely

* U.S. v. Bosurgi, supra, 530 F.2d at p. 1112.

in dispute," (530 F.2d at p. 1110).*

Indeed, on the appeal below, the following disavowal of the position previously taken by the Government on the prior appeal was ignored:

> "Plaintiff [U.S.] has never contended that the Bosurgis' state court action against the Chemical Bank pertained to the Custodian Account in the name of Adriana Bosurgi." (A 49)

Also:

> "More importantly, the source of the $215,000 fund is irrelevant to this tax collection action." (A 49)

And indeed, in its brief below (p. 28):

> "SAICI is correct that the source of the fund is not relevant to the tax collection aspects of this case."

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* The Court of Appeals in affirming the "denial of the Government's motion for summary judgment" observed that "the circumstantial evidence underlying the Government's motion is insufficient in view of the December 1954 agreement (the authenticity of which is not seriously disputed by the Government) to warrant a grant of summary judgment" (U.S. v. Bosurgi, 530 F.2d at pp. 1112-13).

Finally, the Government citing Montana v. United States, 440 U.S. 827, contends (p. 6) that the doctrine of nonmutual collateral estoppel does not apply here. We do not contend that SAICI's State Court action and its judgment against the bank and the bank's funds is binding upon the Government either under the doctrine of res judicata or collateral estoppel as to any issue involving the Government's estate tax claim either against the estate of Adriana Bosurgi, the Bosurgis themselves or the bank. We do contend that the doctrine of collateral estoppel precludes the Government or anyone else for that matter from attacking SAICI's State Court judgment insofar as it involves the bank and the settlement of SAICI's common law cause of action and that in any event,

the Government is estopped from doing so in the federal court after its attempts in the state court failed. The integrity of SAICI's State Court judgment may not be challenged, because to quote Montana, supra, one "who assists in the prosecution or defense of an action in aid of some interest of his own * * * is as much bound * * * as he would be if he had been a party to the record" (Montana, at p. 154).

THE BROAD DISCOVERY AVAILABLE TO AND AVAILED OF BY THE GOVERNMENT

The Government was furnished with the voluminous pretrial deposition of Richard Ginglen (482 pages), the Chemical Bank officer in charge of the Bosurgi account and all available

records and documents of the bank pertaining to any of the parties hereto, spanning a period of more than two decades. The Government conducted its own pretrial deposition of Mr. Ginglen (130 pages); also a pretrial examination of Benedict Ginsberg (71 pages). The Government was permitted to examine our office files and to make note of the documents supplied to us from abroad. (A 36-7)

On November 24, 1971 we gave the United States Attorney a photostat of a document attested by a notary public, with a translation certified by the American Vice Consul at Montevideo, Uruguay, which set forth that:

> "(a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial Investments Corporation);

(b) That they have not attended any meeting of the Society; and (c) That they have never occupied any office of director, nor they have discharged any executive office within the Society neither direct or through legal attorneys."

Shortly thereafter, at a conference with Leon Hart, United States Attorney at the Appellate Division of IRS, specific reference was made to the foregoing document and in response to his request we gave him two copies of SAICI's State Court summary judgment motion and the documents in support thereof. In return, since the Government had better investigatory facilities, we requested and it was agreed that we be furnished with whatever information was obtained bearing upon the authenticity of the documents supplied to us and upon which we relied. Our subsequent requests therefor were ignored and met with the

following claim asserted in an affidavit by Government counsel:

> "7. All work undertaken by Hart relating to SAICI's claim of ownership of that custodian account was in the course of his duties and responsibilities as Appellate Appeals Officer for the Internal Revenue Service in connection with those tax petitions filed in the United States Tax Court. The resulting information and materials, if any, are therefore privileged as attorney work product. See Rule 26(d)(3) of the Federal Rules of Civil Procedure." (A72)

The Government fails to indicate a single line of inquiry and any specific fact that it can or could produce through an examination of SAICI's officers if any were available that would conceivably have any bearing on the validity of SAICI's State Court judgment upon which SAICI solely relied. Moreover, as SAICI's counsel stated below:

> "We claim we have answered all the interrogatories that were within reason to answer. There is nobody alive as I understand it. It is an anonymous company. We have no opportunity to get in touch with any people..." (A96)

No trial or meaningful judicial hearing was accorded on the issues thus presented, notwithstanding that the order of preclusion theretofore granted by Magistrate Bernikow restricted SAICI to proving that the State Court litigation was, to employ the language of this Court in Durfee v. Duke, 375 U.S. 106, 111, "fully and fairly litigated" as between the bank and SAICI.

What was resorted to here by the Government, to quote United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970) is "a clever procedural gambit" whereby SAICI was unconstitutionally deprived of a trial and hearing as to the integrity of its State Court judgment and subjected to an enormous penalty of $400,000 which it is earnestly submitted is a grave miscarriage of justice.

Indeed, the record warrants the summary direction by this Court that the trial of such issue be promptly had.

Respectfully submitted,

SAMUEL GOTTLIEB
Attorney for Petitioner